

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW
Washington, D.C. 20001-8002



Date: September 11, 1992
Case No.: 90-INA-66

In the Matter of:

CANADIAN NATIONAL RAILWAY CO.,
Employer

on behalf of

PERRY GEORGE BARKHOUSE,
Alien

Appearance: Courtland R. LaVallee, Esquire
Kenneth R. Peel, Solicitor
For the Employer

Michele Curran, Esquire
For the Certifying Officer

David Stanton, Esquire
Amicus Curiae for the American Immigration Lawyers
Association

Before: Brenner, Clarke, De Gregorio, Glennon, Groner,
Guill, Litt, Romano, and Williams
Administrative Law Judges¹

DECISION AND ORDER

The above-named Employer requests review pursuant to 20 C.F.R. §656.26 (1991) of the United States Department of Labor Certifying Officer's denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(14) (1990) ("Act"). This portion of the Act was amended by section 212(a)(5)(A) of the Immigration Act of 1990, and is now codified at 8 U.S.C. §1182(a)(5)(A).

Under section 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive a visa

¹ Judges Glennon and Groner did not participate in the consideration of this Decision and Order.

unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

Statement of the Case

There is substantial agreement on the facts of this case. The Employer, Canadian National Railway Company, seeks permanent labor certification for the alien, Perry George Barkhouse, to fill the position of Railway Bridge Operator Leverman. Appeal File (AF) at 5. The Employer states that recruitment activities are governed by the terms of a Collective Bargaining Agreement (CBA) with its employees' labor union, as well as by statute.

The CBA requires the Employer to attempt to fill this type of position from its pool of current employees. Additionally, the CBA provides that "qualifications being sufficient, seniority will govern." With regard to nationality issues, the CBA requires that "the leverman positions are bulletined for all employees, whether citizens of Canada or of the United States," and determinations of seniority among union members are made without regard to citizenship. AF. at 24-25. Using the CBA criteria, the alien was appointed to fill the opening on the basis of his qualifications and seniority.

Following the alien's appointment the Employer submitted the ETA 750 form, and requested a waiver under 20 C.F.R. § 656.21(i) of further recruitment. The Employer based this request on its efforts to recruit U.S. workers under the terms of the CBA. AF. at 4 and 8.

On June 14, 1989, the CO issued a Notice of Findings (NOF) proposing to deny labor certification, and stated:

Section 656.20(c)(8) requires that the job opportunity be open to any qualified U.S. worker. Since in this case it is not, certification cannot be issued.

AF. at 18-19 (emphasis in original).

In a rebuttal dated July 5, 1989, the Employer explained the nature of its contract with the union and the procedures followed in its efforts to fill the position. The Employer stated that it had attempted to comply with the CBA and with U.S. regulations and that it considers itself restrained by the CBA from engaging in an "open job competition to 'all comers.' " The

Employer added that "any qualified U.S. worker is entitled to the position, in accordance with the usual security rights and opportunities established for all employees." AF. at 30.

The CO issued a Final Determination on August 23, 1989, stating that "[w]e have reviewed your rebuttal of July 5, 1989 and find it does not adequately rebut our finding that the position is not open to any qualified U.S. worker." AF. at 32-33 (emphasis in original).

By letter dated September 18, 1989, the Employer requested review of the denial of labor certification. AF. at 64. The Employer noted, in pertinent part, the following: (1) the job offered is subject to Collective Bargaining Agreement 7.12; (2) "any U.S. worker, who is a member of a union to whom the positions are reserved, would thereby be qualified and entitled to seek and to accept such a position, provided that he or she is the most senior applicant for the position; (4) the position is "reserved to persons qualified as members of the Union, and/or having appropriate seniority to bid for the position, and by valid contract, enforceable at law and consistent with the statute and public law." AF. at 62-64. A copy of relevant portions of the Collective Bargaining Agreement was included with the request for review. AF. at 39-48.

Because of the novelty of the issue involved, the Board issued a Notice and Order on February 11, 1992 stating that it would review this matter en banc, on its own motion. Supplemental briefs were received from the Employer and Certifying Officer as well as from the American Immigration Lawyers Association (AILA) as amicus curiae. On May 5, 1992, the Board entertained oral argument.

Discussion and Conclusions

We start with three premises. The first is that the tenor of the Title 20 C.F.R. Part 656 regulations, when considered as a whole, grant a favored status to labor unions and their collective bargaining agreements. Employers are prohibited under §656.20(c)(6) from seeking labor certification for a job opportunity which is vacant because the former occupant is on strike or is being locked out because of a labor dispute involving a work stoppage or the job opportunity is otherwise at issue in a labor dispute. Under §656.21(b)(4) & (5) if unions are customarily used for recruitment in the industry or area, employers are required to recruit through unions even if their own businesses are not unionized. See David Howard of California, 90-INA-241 (May 12, 1992) (en banc). Pursuant to §656.40(a)(2)(ii), if the job opportunity is covered by a union contract, the wage rate set for the position in the contract becomes the prevailing wage which must be offered by the employer.

The second premise is that unlike other labor organizations, railroad unions enjoy the special privilege under Section 2, Subdivision 11 of the Railway Labor Act, 45 U.S.C.A. §152, subd. 11, of having their union shop agreements exempted from "right to work" provisions in state laws and constitutions. Railway Employer's Dept. v. Hanson, 351 U.S. 225 (1956) Both the Railway Labor Act and §212(a)(5)(A) (1992) of the Immigration and Nationality Act are designed to offer protection to U.S. workers. It is difficult to perceive, therefore, how a railroad labor agreement such as the one involved here can have an adverse effect on U.S. workers.

Our third premise is that the Secretary has determined that the grant of labor certification under the circumstances involved here would not be precluded by §212(a)(5)(A) of the Immigration and Nationality Act. We base this premise on the proposed rule published in the Federal Register of January 16, 1981 which would have provided for the placement of the instant job opportunity on the Schedule A Precertification List. 45 Fed. Reg. 3910. We recognize that the Proposed Rule has never been promulgated in final form. However, this was not because of any subsequent determination that the rule would not be in keeping with the Act. Rather, as indicated in the Federal Register of May 15, 1981, it was held in abeyance for further study after the "proposed amendment generated considerable more controversy than expected." 46 Fed. Reg. 26790. The proposal has never been formally "killed." It has just been allowed to "fade away".

The CO cites only §656.20(c)(8) as the basis for denial of certification in this case. Section 656.20(c)(8) requires the Employer to show that "[t]he job opportunity has been and is clearly open to any qualified U.S. worker." The CO in her NOF and Final Determination has emphasized the word "any" in the regulation. We believe that her emphasis is misplaced. It more properly belongs to the term "qualified." What needs to be decided in this case is the proper definition of a "qualified U.S. worker."

Section 656.20(c)(8) does not state what constitutes appropriate qualifications. Section 656.21(b)(2), however, defines what job requirements an employer may impose, and thereby sets the perimeters of appropriate job qualifications. Because it provides a detailed standard for determining appropriate job qualifications, it also provides the best guideline of what constitutes an appropriate qualification under section 656.20(c)(8). We hold that a job requirement that passes muster under section 656.21(b)(2) is also an appropriate qualification under section 656.20(c)(8).

The Board in Information Industries, Inc., 88-INA-82 (Feb. 9, 1989) held that

[i]f the job requirements are those normally required for the job in the United States and are those defined for that job by the D.O.T., the job's requirements are not unduly restrictive and it is unnecessary for the employer to document that they arise out of business necessity.

The Employer asserts that union membership and seniority are normal requirements for a Leverman position, and that the job, since its inception "in the last century" has always required union membership. Not only do these assertions appear credible they are also corroborated, in substance, by the Secretary's own findings set forth in the January 1981 proposed rulemaking. We conclude, therefore, that union membership and seniority are normally required for this job in the United States.

Even assuming that the Employer has not established that union membership and seniority are normal requirements of the job, we conclude that business necessity for the same has been established.

To establish business necessity under section 656.21(b)(2)(i) an employer must demonstrate that the job requirements "bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform, in a reasonable manner, the job duties as described by the employer." Information Industries, supra.

Here, union membership bears a relationship to the occupation in the context of the Employer's business because the railroad is unionized. Union membership is also essential to reasonable performance of the job duties. Hiring a worker who does not meet the CBA imposed requirements exposes the Employer to the risk of grievance procedures, potential lawsuits, labor disruptions, may otherwise upset the balance of management-labor relations, and may impair its ability to provide safe and orderly public railway transportation facilities. AF. at 62. These risks go to the core of the Employer's ability to function as a business, and come close to meeting even the strict standard for establishing business necessity stated in Diaz v. Pan Am World Airways Inc., 442 F.2d 385 (5th Circuit 1971)—"something the absence of which would undermine the essence of the business operations." This standard was rejected by the Board in Information Industries on the ground that it was a higher burden than an employer needs to meet.

Furthermore, the Board has recognized that concerns related to the safety of the employer and the viability of an employer's operations are relevant to the question of business necessity. See, e.g., Jeffrey Sandler, M.D., 89-INA-316 (Feb. 11, 1991) (en banc) (requirement that Child Monitor not smoke on the premises). External requirements imposed on the employer have been considered in determining the business necessity of a requirement that did not go to the skills necessary to performing the job but that did relate to the employer's ability to operate in cooperation with the body imposing the external requirement. Pay Med/Health Assistance for Travelers, Inc., 89-INA-166 (Feb. 6, 1990) (requirement of possession of Canadian medical license for a health care Administrator specializing in health care for travelers was justified by business necessity where which the employer obtained the bulk of its revenue indicated that the system would only provide information to physicians licensed in Canada).

Based on the foregoing, we find that union membership and selection based on CBA-imposed criteria are proper qualifications for purposes of section 656.20(c)(8).

The only regulatory language possibly supporting the CO's suggested construction of "qualified" is found in section 656.24(b)(2)(ii), which provides that the CO "shall consider a U.S. worker able and qualified for the job opportunity if the worker, by education, training, experience, or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other U.S. workers similarly employed" Although section 656.21(b)(2) provides a detailed procedure for determining what job requirements an employer may impose, this regulatory language does not persuade that "qualified" in section 656.20(c)(8) means only skills needed to do the job.

That the word "qualified" as used in section 656.20(c)(8) does not limit qualifications to skills needed to perform the job is bolstered by the tenet of statutory and regulatory construction is that words are to be given their natural, ordinary and familiar meaning unless an intent that the words should be construed otherwise is evident. Jones v. Liberty Glass Co., 332 U.S. 524

(1947). Webster's New International Dictionary, Second Edition, defines "qualified" as, inter alia, "[h]aving complied with the specific requirements or precedent conditions for an office, appointment, employment, etc."

We find further support for our view that "qualified" as used in § 656.20(c)(8) means more than simply physically and mentally qualified in case law interpreting the term under an employment protection statute of as noble a purpose as the Act here involved, i.e., the reemployment provisions of the Selective Service Act. Under the Selective Service Act an employer was required to reinstate a returning veteran to the position he or she held before service provided he or she was "still qualified to perform the duties of such position." In Bozar v. Central Pennsylvania Quarry, Stripping & Construction Co., 73 F. Supp 803 (D.C. M.D. Penn.1947) the returning serviceman had applied for reinstatement of his job as a truckdriver which he was still mentally and physically capable of performing. However, the job had been unionized with a closed shop agreement in his absence and he was not, nor did he desire to become, a member of the union. Consequently, the Employer declined to reemploy him in his former position but did offer him an alternate, non-union position albeit at a more distant location. The Court held:

"Petitioner was admittedly a competent truck driver and qualified for the position offered but he was not qualified for the position demanded in view of the requirement that 'all employees be members of the United Mine Workers of America.'"

Finally we note that we do not perceive this case as one in which the Employer seeks to circumvent the provisions of §212(a)(14) of the Immigration and Nationality Act by private agreement. Rather, it has entered into a collective bargaining agreement as otherwise required by its legal obligations. As pointed out by the Court in Bozar, it was thus subject to the rule precluding separate hiring agreements on matters subject to the collective bargaining agreement.

Based on the forgoing findings and conclusions, we hold that the Employer did not violate section 656.20(c)(8) by asserting in the applicant that the job was clearly open to any qualified U.S. applicant.

ORDER

The Final Determination of the Certifying Officer denying certification is REVERSED and the Certifying Officer is directed to reinstate the priority date and GRANT certification.

For the Board:

JOEL R. WILLIAMS
Administrative Law Judge

JRW/wr/trs

In the Matter of Canadian National Railway Co., 90-INA-66
Judge David A. Clarke, Jr., dissenting. Judge Ralph A. Romano concurring in the dissent.

My colleagues base the majority decision on three premises. However, contrary to the first premise, it has never been established that the tenor of Title 20 CFR Part 656 of the regulations was intended to grant favored status to foreign labor unions and their collective bargaining agreements.

Contrary to the second premise, while the Supreme Court may have held that railway shop agreements are exempt from "right to work" provisions of state constitutions and laws, it has never held that railway shop agreements of foreign railroad companies are exempt from or take priority over the immigration laws of the United States.

Contrary to the third premise, the proposed rule published in the Federal Register on January 16, 1981, which would have provided for the placement of the subject job on the Schedule A Precertification list, was never promulgated and never became law. Therefore, it cannot serve as a basis to grant labor certification in this case.

The CO cited 20 CFR §656.20(c)(8) as the basis for the denial of certification. Section 656.20(c)(8) requires the Employer to show that "[t]he job opportunity has been and is clearly open to any qualified U.S. worker."

The majority have decided that to interpret this section emphasis must be placed on the interpretation of the word "qualified." And they hold that a job requirement that passes muster under section 656.21(b)(2) is also an appropriate qualification under section 656.20(c)(8). They then hold that union membership and seniority in a foreign union which has a collective bargaining agreement with a foreign railroad company is a normal requirement for the job of leverman in the United States and that only members of that union are qualified for the job. They also accept Employer's unsupported contentions and find that a business necessity exists under section 656.21(b)(2)(i) because union membership is essential to the reasonable performance of the job to avoid potential grievance procedures, lawsuits and labor disruptions.

My colleagues have taken a circuitous route through the regulations to support labor certification. However, in so doing, they have lost sight of the purpose of the Act.

The purpose of the Act and the labor certification process is to protect the U.S. labor market from foreign competition. Section 212(a)(14) creates a statutory preference for the employment of U.S. workers. Ashbrook-Simon-Hartley v. McLaughlin, 863 F.2d 410, 412 (5th Cir.1989). Consequently, an employer who seeks alien labor certification has the burden of meeting the criteria set forth in section 212(a)(14) of the Act to establish that there are no qualified, willing, and able U.S. workers available for the job.

To implement the Act, the Department of Labor (DOL) has enacted comprehensive regulations governing the alien employment certification process. 20 C.F.R. Part 656. One of the principal requirements is that the job opportunity has been and is clearly open to any qualified U.S. worker. 20 U.S.C. §656.20(c)(8)

Membership and seniority in a foreign union should not determine whether a U.S. worker is qualified for a job in the United States, with a foreign employer doing business in the United States. The collective bargaining agreement in question is not superior to the laws of the United States and should not be treated as such. There is no provision in the existing law that would allow certification of the alien without compliance with the Act.

As noted by the majority, the word "qualified" is defined in terms of experience, education, and training at 20 CFR §656.24(b)(2)(ii). Employer and my colleagues have failed to demonstrate that foreign union membership and seniority are reasonable benchmarks of the experience, education, and training required for the job of railway leverman. The regulations do not provide for the word "qualified" to be curtailed to denote only the one individual with seniority in a foreign union.

Moreover, Employer and my colleagues have failed to demonstrate how membership and seniority in a foreign union take precedence over U.S. citizens or otherwise qualified U.S. workers for a job in the United States. The U.S. labor market was never tested; at a time when millions of Americans are out of work.

The CO correctly determined that the job offered was not open to any qualified U.S. worker as required by 20 CFR §656.20(c)(8) and acted appropriately in denying labor certification on that basis. I would affirm the denial.

DAVID A. CLARKE, JR.
Administrative Law Judge

I Concur:

RALPH A. ROMANO
Administrative Law Judge